United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

w/affidavit

75-4064

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4064

CHENG, SAU FU (A15 665 605)
YEUNG, KO NARN (A15 928 614)
LAM, SIN WAI (A15 998 590)
CHIU, KAM MUK (A18 059 999)
LI, KWONG PAN (A19 661 999),
Petitioners,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

B
P/S

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Issue Presented

Whether the aliens' application for termination of deportation proceedings was properly denied in the administrative proceedings below.

Statement of the Case

Pursuant to Section 106a of the Act, 8 U.S.C. § 1105a, Sau Fu Cheng, Ko Narn Yeung, Sin Wai Lam, Kam Muk Chiu and Kwong Pan Li petition this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on March 14, 1975. That order dismissed an appeal from the decision of an

Immigration Judge finding the petitioners deportable pursuant to Section 241(a)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1251(a)(1) and denied their application for termination of deportation proceedings.

In their petition for review the aliens seek to have the order of deportation set aside and the deportation proceedings terminated. They further pray that this Court find that they have been paroled into the United States and seek to have the respondent restrained from deporting them from the United States.

The petitioners filed this instant petition for review in this Court on April 2, 1975. Since that time they have enjoyed the mandatory stay of deportation pending a determination of their petition by virtue of Section 106(a)(3) of the Act, 8 U.S.C. § 1105(a)(3).

Relevant Statute

Section 101(a)(13) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(13):

> The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary:

Provided, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

Statement of Facts

The petitioners, aged 42, 50, 29, 33 and 34, respectively, are all natives and citizens of China. On or about September 23, 1973 at 3 A.M. the petitioners, along with six other aliens, were apprehended by the United States Immigration and Naturalization Service after they had entered the United States near Highgate, Vermont. Prior to this entry the petitioners had previously been arrested and deported from the United States. None of these aliens had obtained the special consent of the Attorney General to reapply for admission as provided in Section 212 of the Act, 8 U.S.C. § 1182. As a result of their entry on December 12, 1973 the petitioners upon a plea of guilty were convicted and sentenced for the violation of Section 276 of the Act, 8 U.S.C. § 1326 by the United States District Court for the District of Vermont.*

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* Section 276 *supra* provides:

REENTRY OF DEPORTED ALIEN

Any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act.

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

Deportation proceedings were commenced by the Service with the issuance of an order to show cause and notice hearing. On March 21, 1974 a deportation hearing was commenced before an Immigration Judge wherein the petitioners, while represented by counsel, agreed that their cases should be heard jointly. At the hearing the aliens conceded their alienage, their prior deportations, and their failure to obtain special permission to return to the United States. The aliens denied making an "entry" into the United States within the legal meaning of that term, and denied not being inspected by an immigration officer. On the basis of this contention the aliens, by their attorney, moved to have the deportation proceedings terminated. On April 26, 1974 the Immigration Judge rendered a decision denying the aliens' application for termination of the proceedings and ordered that the aliens be deported. In reaching his decision the Immigration Judge found that the aliens had affected an "entry" into the United States as defined in Section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13) and therefore deportation proceedings under Section 242 of the Act 8 U.S.C. § 1252 were properly instituted. On April 30, 1974 the aliens appealed the decision of the Immigration Judge to the Board of Immigration Appeals. The aliens alleged that the Immigration Judge erred in finding them deportable and alleged that exclusion proceedings rather than deportation proceedings should have been conducted.

ARGUMENT

The aliens were properly determined to have effected an entry into the United States and therefore their application to terminate deportation proceedings was properly denied.

The aliens contend that their application for termination of deportation proceedings was improperly denied by the Immigration Judge. The sole issue therefore is whether the Board of Immigration Appeals correctly affirmed the findings of the Immigration Judge that the aliens had affected an "entry" into the United States on September 23, 1973. If the alien petitioners herein effected an *entry* into this country deportation proceedings must be conducted, whereas exclusion proceedings may be instituted if they had not *entered* the United States.*

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* The petitioners contend that the nature of the proceedings under the statutes relating to exclusion are different from those relating to deportation, and that certain rights or consequences flow from exclusion proceedings which are not available in deportation proceedings. There is a conceptual difference between exclusion and expulsion proceedings, and as a result, the protections afforded aliens in a deportation proceeding are greater than those afforded in an exclusion proceeding. It is therefore not surprising that judicial and administrative decisions often relate to aliens who, having been the subjects of exclusion proceedings, argue that they should have received the advantages of a deportation hearing pursuant to Section 242(b). See *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958); *Matter of A*, 9 I & N Dec. 356 (1961); Gordan and Rosenfield, Immigration Law and Procedure at § 3.18. These statutory distinctions have been properly enacted pursuant to Congress' plenary power over matters relating to immigration. Having been properly found deportable the aliens are subject solely to the statutory provisions relating to deportation proceedings and they should not be heard to complain that Congress enacted other statutory provisions which relate to exclusion proceedings and which are inapplicable to their situation. Nonetheless, although the petitioners refer to the availability of adjustment of status for aliens paroled into the United States, it might be noted that they would be statutorily ineligible for that form of discretionary relief even if they were aliens who had been paroled into this country and were subject to exclusion proceedings.

The term "entry" is defined in Section 101(a)(13) of the Act as ". . . any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise. . . ." * The Board of Immigration Appeals in applying this definition after reviewing past judicial precedent has concluded that an entry under Section 101(a)(13) of the Act involves (1) a crossing into the territorial limits of the United States, i.e., physical presence; *plus* (2) inspection and admission by an immigration officer; *or* (3) actual and intentional evasion of inspection at the nearest inspection point *coupled with* freedom from official restraint. See *Matter of Pierre, et al.*, Interim Decision # 2238 (Decided by the Board of Immigration Appeals October 5, 1973). Based upon prior judicial and administrative precedent, it is respectfully submitted that the actions of the petitioners here satisfied the essential elements of an entry, and therefore, deportation proceedings were properly instituted.

Since there is no dispute that the aliens physically crossed the international boundary and were apprehended in the United States, the first element is clearly satisfied in this case. The record also unequivocally shows that these aliens actually and intentionally evaded inspection at the nearest inspection point. In this respect, the evidence adduced in the administrative proceedings below reflects that the aliens *intentionally* evaded inspection in that (1) they surreptitiously crossed the international boundary and were travelling on Bradley Road rather

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* While the legislative history of this term relates primarily to the effect of a subsequent entry upon the status of a lawful resident alien, the Congressional analysis of that definition provides: "Normally an entry occurs when the alien crosses the border of the United States and makes a physical entry, and the question of whether an entry has been made is susceptible of a precise determination." H.R. No. 1365, 82d Cong. 2d Sess. 1683 (1952).

than U.S. Route 7, which is the ordinary corridor to the inspection station; (2) this crossing was at approximately 3:00 A.M. and the aliens were proceeding without vehicle lights; (3) upon apprehension the van carrying the aliens was found to contain angle-irons which had been used to de-activate the vehicle detection apparatus at the border; (4) the aliens were concealed in the van such that their presence could not be detected; and (5) the driver of the van had, one week prior to the entry of these aliens, escaped apprehension by the Vermont State Police when he had surreptitiously entered the United States in the same manner.

In addition, their *actual* evasion of inspection is reflected in the record by their eastward turn onto Bartlow Road after passing at least two traffic signs which indicated that the only route to the inspection station would have been in a southerly direction. Clearly, their choice of Bradley Road rather than the ordinary corridor, Route 7, sufficiently evidences an actual evasion of inspection by immigration authorities.

Counsel for the petitioners argues that the aliens were not "successful" in evading inspection and therefore they did not effect an entry. It is submitted that his contention is unpersuasive and contrary to law. As in this case, when an alien crosses the international border, that person must follow the ordinary path from the international line and proceed *directly* to the nearest inspection point. See *United States ex rel. Giacone* v. *Corsi*, 64 F.2d 18 (2d Cir. 1933); *Matter of Estrada—Betancourt*, 12 I & N 191 (decided by the B.I.A. 1967). In *Giaconi*, *supra*, the alien was in the proximity of the Canadian border when apprehended, and although, as in this case, he was a short distance from the inspection station the Court found that he had also *intentionally* entered the United States and was subject to *deportation* proceedings under the charge

of entering without inspection. The records of proceedings relating to this petition show that the aliens failed to proceed directly to the nearest inspection point. The fact that they were apprehended prior to reaching their intended destination, New York City, does not relieve them from deportation. Cf. *Thack* v. *Zubrick*, 51 F.2d 634 (6th Cir. 1931) where the alien made every effort to present himself for inspection and where it was found he did not intend to avoid inspection.

Finally, the Immigration Judge found that while the aliens actually and intentionally evaded inspection they also enjoyed freedom from official restraint. Certainly there was no official restraint in terms of the alien having been brought into the United States for internment, see *United States ex rel. Shirrmeister* v. *Watkins*, 171 F.2d 858 (2d Cir. 1949), *cert. denied*, 337 U.S. 942; nor were these aliens paroled into the United States pursuant to Section 212(d)(5) of the Act, 8 U.S.C. § 1182(d)(5) or detained pending formal disposition of a request for admission. See *Klapholz* v. *Esperdy*, 201 F. Supp. 294, affirmed per curiam, 302 F.2d 928 (2d Cir. 1961), *cert. den.*, 371 U.S. 891; *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958); *Matter of Pierre*, *supra*. Rather, the only official restraint suggested by the petitioners is that they were under surveillance by the Border Patrol. The findings below indicate that the Border Patrol Officer merely heard a vehicle pass the intersection where he was stationed. This intersection was .4 mile beyond the international boundary. Further, it was not until another .6 mile before the van transporting the aliens was seen by the patrolman Compare *Ex parte Chow Chok*, 161 Fed. 627, *aff'd.*, 163 Fed. 1021 (2d Cir. 1908) relied on by the petitioners. In *Chok*, *supra*, the aliens were under constant and continuous surveillance both prior to, and after, they crossed the international boundary; the court there found that the aliens were in actual custody of the in-

spectors at the time of crossing the border, and could not have been "found" unlawfully within the United States.*

In the present case the aliens were totally free to disembark from the vehicle and could likely have evaded the Border Patrol had they done so prior to its being stopped. Since these aliens were not under surveillance before crossing the border and were not even observed until some time after they had successfully made a physical entrance into the United States the rationale of *Ex Parte Chow Chok*, *supra*, is inapplicable to this situation. See *Ex rel. Giacone*, *supra*.

The findings by the Immigration Judge that the petitioners had entered the United States within the meaning of Section 101(a)(13) of the Act, *supra*, as discussed above is supported by substantial evidence contained in the record of proceedings relating to each of the petitioning aliens. Section 106a(a)(4), 8 U.S.C. § 1105a(a)(4); *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 282 (1966). Therefore, it is respectfully submitted that the decision and order of deportation, affirmed by the Board of Immigration Appeals, is entitled to affirmance by this Court.

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* *Ex parte Chow Chow*, *supra*, related to the definition of "an alien found unlawfully within the United States" under the Act of July 5, 1884, (23 Stat. 115).

CONCLUSION

The petition should be dismissed.

Respectfully submitted,

Dated: January, 1976
New York, New York

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State of New York)
County of New York) ss

Pauline P. Troia being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 30th day of January, 19 76 s he served a copy of the within 2 copies of govts brief

by placing the same in a properly postpaid franked envelope addressed:

Lebenkoff & Covens Esqs.,
1 East 42nd St.
NY NY 10017

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
30th day of January, 19 76

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572500
Qualified in Bronx County
Commission Expires March 30, 1978